

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Bell Atlantic Telephone Companies)	
Tariff FCC No. 1)	CC Docket No. 98-168
Transmittal No. 1076)	
)	
To: Competitive pricing Division)	

OPPOSITION TO THE DIRECT CASE

KMC Telecom Inc. ("KMC"), pursuant to Section 204 of the Communications Act and the Order Suspending Tariff and Designating Issues for Investigation in this proceeding, hereby opposes the Direct Case of Bell Atlantic Telephone Companies ("BA") filed in the above-referenced matter on October 6, 1998. Bell Atlantic's Direct Case fails to justify its Transmittal No. 1076. For the reasons set forth below, KMC respectfully submits that the Commission should reject this ADSL interstate offering.

KMC filed comments in the proceedings considering the ADSL tariffs of GTE Operating Companies, and BellSouth Telecommunications, Inc.¹ Because the issues under investigation in this proceeding "are identical to the issues designated here,"² KMC refers the Commission to its

¹ GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Trans. No. 1148 CC Docket No. 98-79; BellSouth Telecommunications, Inc., Tariff FCC No. 1 Access Service, BellSouth Trans. No. 476, CC Docket No. 98-161 and GTE System Telephone Companies; GSTC Tariff No. 1, GTOC Trans. No. 260.

² Direct Case of Bell Atlantic at 2, n.2.

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Comments in response to those Direct Cases and incorporate those comments into this investigation by reference.

Bell Atlantic, in addition to repeating the arguments of its fellow ILECs, stated that it sought to address certain concerns raised by CLECs in the earlier proceedings. Bell Atlantic fails to do so. Rather than address these concerns on the merits, Bell Atlantic's comments evidence an effort to have the Commission address issues far beyond those raised by the designation order, while at the same time ignoring the fact that Congress in 1996 amended the Communications Act in fundamental ways which directly impact the continued relevance and viability of the "history" Bell Atlantic seeks to rely on.

It is clear that what is at issue here is a service by which one local exchange service customer reaches another local exchange service customer, in this case an ISP. In continuing to press its "end-to-end" analysis, Bell Atlantic would have the Commission ignore what it has said in every decision since the passage of the 1996 Act. Information services and telecommunication services are distinct and severable. The telecommunications service offered under this proposed tariff terminates at the ISP. Bell Atlantic simply ignores the fact that what the ISP does thereafter to provide its services to its end users simply is not relevant to the inquiry here.

Bell Atlantic's approach is the result of its desperate desire to have this Commission address the issue of whether reciprocal compensation is owed to CLECs when they terminate dial-up local calls from Bell Atlantic end users to CLEC end users who are ISPs. In doing so, Bell Atlantic would have this Commission preempt the decisions of twenty-one state commissions that have decided this question and, in every case, rejected the same arguments Bell Atlantic makes here.

Bell Atlantic, in its overwhelming desire to reverse state commission decisions concerning dial-up calls to ISPs, has the temerity to argue that reversing the decision of every state that has considered the issue, would not create a conflict with the states.³ If the twenty-one decisions to date do not present clear enough evidence of the sharp conflict which will result from a Commission decision that these calls are not local, Bell Atlantic might find the fact the NARUC adopted a resolution on July 29, 1998 in which it stated "that reciprocal compensation arrangements, including calls to ISPs, are subject to state authority without the need for the FCC to intervene or otherwise act on this matter"⁴ strong evidence that any effort by the Commission to preempt the state decisions on the issue Bell Atlantic seeks to reach in this roundabout manner will most certainly result in serious federal/state conflict.

Bell Atlantic apparently also failed to read the comments filed by the New York Public Service Commission in response to the ADSL filings of GTE, Pacific and BellSouth. In those comments the New York Public Service Commission noted that regulation of the Internet is not at issue.⁵ The NYPSC then went on to note that it had determined that calls to ISPs are intrastate calls and that the fact that in these tariff proposals the ILEC is using its own network to deliver the end user's communications to the ISP, rather than handing those calls to another provider who completes the call does not change the jurisdiction of the traffic. "A call to an ISP is no different from a call

³ Direct Case of Bell Atlantic at 10.

⁴ A copy of that resolution is attached.

⁵ Letter of New York Public Service Commission to the FCC at 2 (September 18, 1998). The same letter was filed in each of the ADSL proceedings.

to any other large volume user."⁶ Any effort to regulate intrastate calls, it noted, would run afoul of the prohibition on the Commission's regulation of intrastate communications.⁷

Despite Bell Atlantic's assertions to the contrary, the Commission will not "for now and the future [divest itself] of any authority over Internet traffic"⁸ by finding that local calls to ISPs using ADSL are local. The Commission need not and should not lightly preempt state regulation of local services. The Commission should not be stampeded into a direct conflict with the states in the narrow context of the appropriateness of tariffing ADSL service on an interstate basis. Obviously, there are circumstances in which ADSL service might be interstate. Bell Atlantic, however, does not want the Commission to limit itself to such a limited inquiry. In fact, Bell Atlantic urges the Commission to address an issue it need not reach – namely whether reciprocal compensation is owed for calls to ISPs terminated by a CLEC. Despite Bell Atlantic's efforts to suggest the contrary, the Commission has made it crystal clear that it does not believe it has addressed that issue at this time. KMC agrees. Moreover, this is not the place to do it.

NARUC in its resolution went on to state that if the FCC decides to intervene in the broader jurisdictional issues of Internet access over the PSN, it should work cooperatively and expeditiously with the states. Reaching out to address the issue of dial-up calls to ISPs in the context of this tariff proceeding will, and should, be viewed as a direct attack on the states rather than any effort to cooperate with the states to address a broad array of issues relating to the Internet.

⁶ Id.

⁷ Id at 3-4.

⁸ Direct Case of Bell Atlantic at 2.

As the Public Utility Commission of Texas in its comments stated quite clearly, "the decision in this proceeding should not be used to establish Commission precedent regarding switched service since...[the] DSL service is a nonswitched service."⁹ The Texas Commission went on to note "that there is no enough information available to make an ultimate determination in this proceeding about the nature of DSL service. We urge the Commission to reject GTE's tariff filing for DSL service and to instead consider the broader policy issues of the nature of advanced telecommunications traffic in the current investigation into Section 706."¹⁰

The Commission should reject Bell Atlantic's effort to open up another front in its war against reciprocal compensation and should reject Bell Atlantic's ADSL tariff.

Respectfully submitted,

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⁹ Comments of the Public Utility Commission of Texas, CC Docket No. 98-79 at 5 (September 25, 1998).

¹⁰ Id.

Reciprocal Compensation for Calls to ISPs

WHEREAS, The Federal Communications Commission ("FCC") has been urged to find that calls to Internet service providers ("ISPs") involving the exchange of traffic between carriers within the same local calling area are within the FCC's exclusive jurisdiction and outside of state responsibility under Section 252 of the Telecommunications Act of 1996; and

WHEREAS, The court decisions to date support that the states have regulatory oversight for these reciprocal compensation arrangements, including calls to ISPs, which must not be disregarded by the FCC in the course of resolving interconnection proceedings; and

WHEREAS, The National Association of Regulatory Commissioners ("NARUC") has previously adopted a resolution at its 1997 Fall Meeting that "at least as long as the FCC's current rule regarding ISP traffic remains in effect, such traffic should continue to be treated as subject to state jurisdiction in interconnection agreements or tariffs" and "be governed by the same legal authority of the applicable state commission that applies to all such interconnection agreements or tariffs;" and

WHEREAS, At least 19 state reciprocal compensation decisions demonstrate that the states are adequately and appropriately carrying out their responsibilities in overseeing the provision of local telecommunications service in situations that involve new demands on local networks by ISPs; and

WHEREAS, Carriers that have concerns about either the rates to be charged for any intrastate telecommunications service or compliance with any state regulations, should seek relief at the state commissions, rather than requesting the FCC to upset the regulatory balance achieved in the Act by asserting federal jurisdiction or otherwise intervening; and

WHEREAS, The broader issue of the jurisdictional treatment of Internet access over the public switched network (PSN) has arisen not only in reciprocal compensation disputes, but also in:

- SBC and GTE filings at the FCC to offer their xDSL services exclusively under interstate tariffs,
- Filings under S. 706 of the Act by Bell Atlantic Corp., Ameritech Corp. and US WEST Communications, Inc. for treatment of advanced services as unregulated or exempt from various sections of the Act,
- The NECA petition for freezing or averaging separations factors to avoid large year to year shifts due to Internet access traffic,
- The FCC's ongoing investigation of Internet usage over the PSN; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 1998 Summer Meetings in Seattle, Washington, holds that reciprocal compensation arrangements, including those for calls to ISPs, are subject to state authority without the need for the FCC to intervene or otherwise act on this matter; and be it further

RESOLVED, That if the FCC intervenes regarding the broader jurisdictional issues of Internet access over the PSN, it should work cooperatively and expeditiously with the states, to consider under what circumstances and through what mechanisms this traffic may be treated as interstate, intrastate, or jurisdictionally mixed; and be it further

RESOLVED, That the NARUC General Counsel be directed to file and take any appropriate actions to further the intent of this resolution.

Sponsored by the Committee on Communications

Adopted July 29, 1998

EXHIBIT

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October 1998, copies of the foregoing
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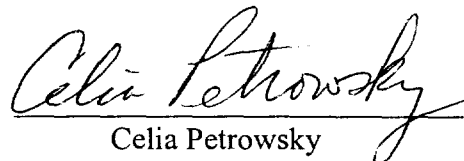
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